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IN THE SUPREME COURT FOR THE STATE OF ALASKA

ACS of Alaska, Inc., ACS of the Northland, Inc., and ACS of Fairbanks, Inc. Appellants v. Regulatory Commission of Alaska, and GCI Communication Corp. d/b/a General Communication, Inc. Appellees.	)	Supreme Court No. S-10466 Superior Court Case Nos. 3AN-98-4759 CI, 3AN-98-4903 CI, 3AN-98-4905 CI (Consolidated) 3AN-99-3494 CI 3AN-99-3499 CI (Consolidated)

On Petition For Review Of The Decisions And Orders Rendered by The Honorable Sigurd E. Murphy and The Honorable John Reese Of The Superior Court, Third Judicial District at Anchorage

BRIEF OF APPELLEE REGULATORY COMMISSION OF ALASKA

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The State of Alaska, this _____
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Clerk of Court

C. Section 251(f)(1)(A) of the Telecommunications Act Does Not Allocate the Burden of Proof in Rural Exemption Proceedings.

The superior court (Judge Murphy) correctly held that "the Act does not assign the burden of proof...." [Exc. 336]. However, the Eighth Circuit Court of Appeals, in reviewing the authority of the FCC to issue regulations implementing the Act, held that the "plain meaning of the statute requires the party making the request to prove that the request meets the three prerequisites to justify the termination of the otherwise continuing rural exemption." *Iowa Utilities Board v. FCC*, 219 F.3rd 744 (8th Cir. 2000), *rev'd on other grounds*, *Verizon Communications v. FCC* (slip.op. May 13, 2002).

This decision was the sole basis for the ACS attempt to stay or vacate the RCA order in this case. Although the result of the Eighth Circuit decision invalidating the FCC burden of proof regulation, 47 C.F.R. § 51.405(a), must be

accepted,[24] this Court is not bound by the Eighth Circuit's interpretation if it is not supported, or even suggested, by the language of the statute or its legislative history. *Totemoff v. State*, 905 P.2d 954, 963-64 (Alaska 1995) *cert. denied,* 517 U.S. 1244 (1996); *In re F.P.*, 843 P.2d 1214, 1215n.1 (Alaska 1992), *cert. denied*, 508 U.S. 950 (1993) ; *Harrison v. State*, 791 P.2d 359, 363 (Alaska App. 1990).

With all due respect to the Eighth Circuit, the decision in *Iowa Utilities Board v. FCC* is hardly the "landmark" claimed by ACS. It is rather a misapplication of the "plain meaning" test and, in addition, ignores the purpose of the Act. Although the U.S. Supreme Court did not review this particular application of "plain meaning," the Court rejected the same Court of Appeals holding that the "plain meaning" of the Act limited the FCC to a methodology tied to historical costs.[25] The Court disagreed with the view of the Eighth Circuit that the Act's use of the word "cost" deprived the FCC of the discretion to implement forward-looking cost methodologies that are less rigidly rooted in the monopoly system. *Verizon Communications*, slip op. at 21-29. The Court has not only rejected the Eighth Circuit's view that there is a "plain meaning" of the Act that greatly limits FCC jurisdiction or discretion, but has made the extraordinary observation that "[i]t would be gross understatement to say that the 1996 Act is not

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[24] The Eighth Circuit was exercising jurisdiction under the Hobbs Act, 28 U.S.C. § 2342 (1), to review challenges from all the federal circuits to the FCC regulations implementing the Act.

[25] No significance can be attached to the decision by the Court not to review this part of *Iowa Utilities Board v. FCC*. A denial of certiorari is not a ruling on

a model of clarity. It is in many important respects a model of ambiguity or indeed even self-contradiction." *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 397 (1999).

The Eighth Circuit in this particular use of "plain meaning" finds a burden of proof rule that is not in the language of the statute. It read the phrase in section 251(f)(1)(A) that the exemption "shall not apply to a rural telephone company until" a request has been made to place the burden of proof on the requesting utility, rather than the incumbent. *Iowa Utilities Board v. FCC*, 219 F.3d at 762. The court said that "[t]he use of the word 'until' suggests" a continuing exemption that is only terminated when the requesting utility has proved that the conditions for removing the exemption are met. 219 F.3d at 762.

The use of the word "suggests" demonstrates how far the Eighth Circuit decision is from the "plain meaning" rule of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) that it was ostensibly applying. The court found further significance in the statute's use of the word "terminate" rather than "grant." 219 F.3d at 762. None of these words contain instructions on what party has the burden to prove that the conditions for terminating the exemption are met. Furthermore, to read these few words to make it easier for the incumbents to maintain their exemptions contradicts the purpose of

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the merits of the Court of Appeals ruling and should be given no substantive weight. *Missouri v. Jenkins*, 515 U.S. 70, 85 (1995).

the Act to uproot entrenched monopolies and transform the way in which telecommunications are provided to all Americans.

In addition by construing the Act to mandate the internal procedure of a state administrative agency, the *Iowa Utilities Board v. FCC* decision fails to consider the constitutional balance of state and federal power. Although Congress can regulate interstate commerce, it is not granted the authority to regulate state governments' regulation of interstate commerce. *New York v. U.S.*, 505 U.S. 142, 166 (1992). Although Congress can preempt state authority and occupy a field, it is limited in the manner in which it can "commandeer" state institutions. *See Hodel v. Virginia Surface Mining & Reclamation Ass'n.*, 452 U.S. 264, 288 (1981).

When Congress mandates a particular procedure for a state agency it is required to make a "plain statement" that it intends to invade this area of traditional state authority and require state institutions to conform to federal procedures. Not only has the Eighth Circuit misapplied any reasonable "plain meaning" test, but it has failed to apply the rule that Congress must make a "plain statement" when it alters the traditional federal-state balance. If the Act contains a burden of proof rule that state commissions must follow in rural exemption proceedings, the Congress must "make its intention to do so 'unmistakably clear in the language of the statute.'" *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991) (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985). Construing the rural exemption provision to impose procedures on a state agency

unnecessarily raises serious constitutional questions concerning the power of Congress to force state agencies and officers into the service of the federal government by mandating the details of state administration.[26] If the statutory language can be read so as to avoid this constitutional question, a court should do so. The Eighth Circuit's imposition of the burden of proof on state administrative agencies as a matter of federal law violates this important canon of federal statutory construction. The commission should be affirmed in its use of state law in allocating the burden of proof to the incumbent utility.

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[26] "It is no more compatible with [state] independence and autonomy that their officers be 'dragooned'.... into administering federal law, than it would be compatible with the independence and autonomy of the United States that its officers be impressed into the service for the execution of state laws." *Prinz v. U.S.*, 521 U.S. 898, 928 (1997); *Petersburg Cellular Partnership v. Board of Supervisors of Nottoway Co.*, 205 F.3d 688, 696-705 (4th Cir. 2000) (Telecommunications Act's mandated standard of proof for local zoning board consideration of permits for microwave towers is unconstitutional under the Tenth Amendment).

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CERTIFICATE OF SERVICE

This is to certify that on the 30th day of July, 2002, a true and correct copy of the BRIEF OF APPELLEE, APPELLEE'S EXCERPT OF RECORD and this CERTIFICATE OF SERVICE were served by mail on the following attorneys of record:

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